REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2018/21912

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

18/12/2019

DATE

MOKOSE SNI

In the matter between:

SPECIAL INVESTIGATING UNIT — 1st Applicant

ACTING NATIONAL COMMISSION OF THE

NATIONAL DEPARTMENT OF CORRECTIONAL

SERVICES FOR RSA — 2nd Applicant

and

ENGINEERED SYSTEMS SOLUTIONS (PTY) LTD — Respondent

JUDGMENT

MOKOSE J

Introduction

[1] This is an application in terms of Rule 53 seeking, *inter alia*:

(i) an order condoning the delay in bringing this application in terms of the common law, alternatively, condonation for the late institution of the application or extension of the period of 180 days in terms of Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively, extending the period in terms of Section 9(1)(b) of PAJA;

(ii) reviewing and setting aside decisions taken by various officials in the employ of the second applicant underpinning:

(a) the award of a tender to the respondent for a pilot project with Tender No. HK07/2011 in which the second applicant issued purchase orders in an aggregate sum of R14 678 269,50; and

(b) the award of a tender to the respondent under Bid No. HO01/2014 being the final tender, wherein the second respondent issued purchase orders in an aggregate sum of R151 116 144,05;

(iii) an order declaring the decision by the second applicant to award both the pilot tender and the final tender to the respondent to be unconstitutional, unlawful, invalid and void *ab initio;*

(iv) a review and set aside of the Service Level Agreement ("SLA") concluded pursuant to the pilot tender as well as the final tender;

(v) an order which the court deems just and equitable in the circumstances in terms of Section 172(1) of the Constitution of the Republic of South Africa, alternatively, relief under the common law and further alternatively, relief in terms of Section 8(1)(c)(ii) of PAJA; and

(vi) an order declaring that the respondent is liable to reimburse the first or second applicant all amounts (including fees and disbursements) received by the respondent from the second applicant pursuant to any and all of the contracts relevant to the pilot tender, the final tender and the first arbitration award that was paid on or about 30 November 2017 in the sum of R22 937 442,75 in respect of arbitration proceedings pending and completed which was made an order of this court under Case No. 23694/2017 on 20 April 2017.

[2] The applicants seek the two contracts to be reviewed and set aside under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), alternatively under the principle of legality.

Background

[3] During 2011 the Department of Correctional Services ("DCS") appreciated the need to properly exercise supervision and control (following a Constitutional Court judgment) over inmates sentenced to death before 1 March 1994 who became eligible for parole and initiated a project to pilot an electronic monitoring system. The services and procurement of the system and other components were the subject of a number of tenders which ultimately formed the subject of the SLA which is in issue in this matter.

[4] The pilot project was awarded to the respondents for a fixed period of twelve (12) months for a total initial contract amount of R6 510 375,00. After the expiry of the twelve-month period and three extensions thereof, the pilot project was extended to twenty-seven

(27) months in all, in circumstances in which, the applicants aver, such extension was concluded without any further procurement procedures being followed.

[5] The respondent was successful in its bid for the final tender and on 21 May 2014 concluded a five-year contract and signed an SLA with DCS to monitor 1000 parolees for a total cost of approximately R301 611 771,86 which contract was set to be completed during 2019.

[6] During approximately August 2016 DCS stopped paying the respondent for the goods and services provided in terms of the Service Level Agreement. The payment dispute was referred to this court where the respondent sought to enforce its rights to payment. The dispute was referred to arbitration by order of court on 20 April 2017.

[7] Arbitration proceedings were concluded in favour of the Respondent during November 2017 after which time, the respondent brought an application to have the two arbitration awards made orders of court. The application was opposed by DCS but on grounds relating to the arbitration proceedings. The order making the arbitration award an order of court was finally granted on 17 May 2018 and remains of full force and effect.

[8] The applicants argue that the court order does not have to be set aside because of the qualification contained in para 4 of the order of 20 April 2017 in which the matter was referred to arbitration, which reads as follows:

> *"The referral to arbitration, the arbitration award flowing from the arbitration, whether it is made a court order or not, and/or any performance on the part of the respondent pursuant to such an arbitration award or court order will in no way prejudice the right of the respondent and/or the Special Investigating Unit to*

challenge the validity of the administrative decision underpinning the agreement and/or the agreement itself in a court of law in due course."

[9] The respondents were of the view that condonation by the applicant ought to be refused and the application dismissed for the reason that the first decision sought to be impugned by the applicants relates to a contract concluded more than seven years before the review application was launched. The second decision sought to be impugned relates to a contract concluded more than four years before the review was launched. In their view, the respective periods of delay are inordinate and manifestly unreasonable.

[10] It was agreed by the parties that in the interest of time, the issue of condonation would not be argued separately and a ruling made prior to the main submissions. The court would make a ruling in respect thereof having heard all the submissions by the parties.

Issues

[11] The issues to be determined by this court are the following:

(i) whether the applicant has satisfied the requirements for a condonation for the delay in bringing this application in terms of the common law, alternatively, an extension of the period of 180 days as referred to in Section 7(1) of PAJA and further alternatively, extending the period in terms of Section 9(1)(b) of PAJA;

(ii) whether the applicant has made out a case for the relief sought to review and set aside the two contracts with the respondent in terms of Rule 53 of the Uniform Rules of Court and whether an order should be granted declaring the decisions of DCS to grant the tenders to be unconstitutional, unlawful and void *ab initio*; and

(iii) whether an order should be granted that is just and equitable in the circumstances of Section 172(1)(b) of the Constitution, alternatively under the common law or in terms of Section 8(1)(c)(ii) of PAJA.

[12] The respondent has noted a number of points *in limine*. Before dealing with them, it is prudent for this court to deal with the condonation application. The application before this court is one, *inter alia,* to review and set aside the decision taken by various officials in the employ of the second applicant in the award of the tender for the pilot project and the final tender.

[13] The court noted in the matter of **Pharmaceutical Manufacturers Association of South Africa & Another: in re ex parte President of the Republic of South Africa & Others**[1] that the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution and insofar as they might be relevant to judicial review, they gain their force from the Constitution. In judicial review of public power, the two are intertwined and do not constitute separate concepts. It can therefore be inferred that PAJA has codified the common law grounds of review.

[14] The Constitutional Court in the matter of **State Information Technology Agency Society Ltd v Gijima Holdings (Pty) Ltd**[2] determined for the first time whether PAJA applies when an organ of State seeks to review its own contract. It held that an organ of State could not use PAJA to review its own decision. The court reasoned that the rights in Section 13 of

[1] 2000 (2) SA 674 (CC) at para 33
[2] 2018(2) SA 23 (CC)

the Constitution were available only to private parties. An organ of State could then bring a legality review of its own decision.

[15] PAJA was enacted, *inter alia*, to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in Section 33 of the Constitution of the Republic of South Africa in which everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

[16] Section 7(1) of PAJA states that any proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after the date of which any proceedings instituted in terms of internal remedies have been concluded or where no remedies exist and the person became aware of the action and the reasons for it.

Condonation

[17] The first and second applicants' case is premised on a two-pronged attack: the legality principle and/or on PAJA arising from the decisions taken by DCS and from which flowed the impugned pilot project and final tender. The applicants submit that over and above the narrow ambit of PAJA, the applicants have established a well-founded case based on the legality principle and the matter may be decided on that basis without abrogating the PAJA grounds for review.

[18] The principle of legality requires a review to be brought without undue delay. The determination of what constitutes 'undue delay' is done on a case-by-case basis and the courts have the power (as part of their inherent jurisdiction) to regulate their own proceedings to

refuse a review application in the face of an undue delay in initiating proceedings. The delay in bringing this application may be overlooked by a court however, the discretion the court must exercise is not open-handed and must be informed by constitutional values and considerations.

Khumalo & Another v MEC for Education, Kwazulu-Natal[3]

[19] This requirement is based on a judicial policy that includes an understanding of the strong public interest in both certainty and finality. Actions by government departments and the general public may be based on the assumption of lawfulness of a decision and the undoing of the decision threatens a myriad of consequent actions.[4]

[20] A factual enquiry needs to be made to determine whether the delay in the launching of the review application was inordinate and unreasonable. Although PAJA does not find application, guidance may be taken from Section 7 of PAJA which requires a review to be initiated within 180 days. A delay in excess of that may be regarded as unreasonable.

[21] A party seeking condonation must make out a case for the indulgence sought from the court. It must give a full explanation for the delay which explanation must cover the entire period and must also be reasonable.

Asla Construction (Pty) Ltd v Buffalo City Metropolitan Municipality[5]

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[3] 2014 (5) SA 579 (CC) at para 44
[4] Khumalo & Another v MEC Education, KwaZulu-Natal (supra) at para 47
[5] 2019 (4) SA 331 (CC) at para 80

[22] In considering whether there had been an inordinate delay and/or whether it should be overlooked or condoned, the principle was upheld in the Asla matter *(supra)* at para 79 that there is a higher duty on the state to respect the law.

[23] The first applicant has failed to provide an explanation for the delay. No explanation was proffered by the first applicant for the delay up to 15 April 2016 for the entire period. The first applicant's affidavit explained that it commenced its preparation of the affidavits on 17 May 2016 but failed to explain why it took until August 2016 to draft such affidavit. Furthermore, vague allegations have been made that as a result of the December/January holidays senior counsel could only be appointed on 17 January 2017 and junior counsel on 30 January 2017. No attempt was made to fully explain the impact of the December/January holiday on such late appointments. These examples are by no means exhaustive. The applicants also failed to explain the delay after the draft review application had been completed. Reference is merely made to Mr Walser's heavy work load. The attempted explanation of the delay ceases and fails to cover the period after the 18 January 2018 to the period after 5 April 2018. The second applicant has confined its attempted explanation to the period after it received its formal mandate on 15 April 2016.

[24] I am of the view that the explanation given by the applicants is vague and fails to give a full and reasonable explanation.

[25] Furthermore, the decision giving rise to the pilot project, although undated and not properly identified, would have been taken more than 7 years before the review application was instituted. The decision giving rise to the final tender award, also undated and not properly identified, would have been taken approximately 4 years before the review application was launched.

[26] As stated above, the respondent is of the view that these lengthy periods of delay on the face of it, are inordinate and unreasonable which unreasonableness is exacerbated by the fact that the pilot project was fully performed as long ago as 2014. Furthermore, the SLA concluded in respect of the final tender was to endure for a period of 5 years and was set to have run its course during 2019.

[27] The applicants submitted that whilst a legality review is not bound by the strictures of the 180-day rule in PAJA, it clearly gives a wider discretion to a court and that the touchstone is whether the legality review has been initiated without undue delay or within a reasonable period. The court must take into account all the circumstances pertaining to the particular case.

[28] Counsel for the applicants brought to the court's attention a recent case of **Swifambo Rail Leasing v PRASA**[6] in which the court dealt with a review application. The application was brought on the principle of legality and it was held that under the circumstances of a delay of three years was not unreasonable.

[29] The Swifambo matter *(supra)* is distinguishable from the present matter. The time which has elapsed in the present matter far exceeds the three years which was not found to be unreasonable in the Swifambo matter. Having considered all the facts, I am in agreement with the respondent that unreasonableness in the present case is exacerbated by the fact that the review proceedings were commenced more than seven and four years respectively after the award of the pilot project and the final tender. I am of the view that should the order sought be granted, it would result in not only the respondent being affected by such decision. I am of

[6] [2018] ZASCA 167 (dated 30 November 2018)

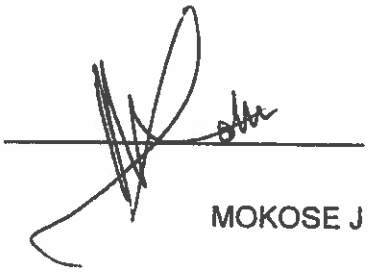
the view that the prejudice that will flow from such a belated review is both self-evident and manifest

[30] I am of the view that the applicant has failed to satisfy the requirements for a condonation for the delay in bringing this application in terms of the common law, alternatively, an extension of the period of 180 days as referred to in Section 7(1) of PAJA and further alternatively, extending the period in terms of Section 9(1)(b) of PAJA.

[31] Accordingly the following order is granted:

(i) The application for condonation for the late filing of the review application is dismissed;

(ii) the applicants are to pay the costs, jointly and severally including the costs attendant of two counsel.



MOKOSE J

Judge of the High Court
of South Africa Gauteng
Division, Pretoria

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Van der Merwe and Ass

Date of Hearing: 7 & 10 May 2019

Date of Judgment: 18 December 2019